Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

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IN THE

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THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

THE QUESTIONS PRESENTED FOR REVIEW

I. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973)?

II. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973)?

STATEMENT OF THE CASE

On November 2, 1973 respondent-physicians filed a three-count *Complaint for Declaratory Judgments and Injunctive Relief* (Apx. pp. 9-20) seeking declarations of certain constitutional rights intrinsically involved in the physician-patient relationship, ***per se***, and such rights as they affect both the class of physicians and the class of women patients, each independently.

Count I (Apx. pp. 9-14) and Count III (Apx. pp. 17-20) were directed against The State Board of Registration for the Healing Arts. The dismissals of the same on May 13, 1974, by the District Court on the basis of "lack of controversy" (Apx. pp. 46 and 53) were not appealed. This decision to forego appeal as to Counts I and III was made by respondents and their counsel in the belief that the issues raised in Counts I and III were more sharply presented and directly confronted in a case entitled *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., filed on June 17, 1974 in the same District Court as the present cause, and now pending on cross-appeals before this Honorable Court.[1]

In reaction to this Honorable Court's historic decisions in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and its companion case of *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179

[1] Reported below at 392 F. Supp. 1362 (E.D.Mo. 1975), *stayed and enjoined*, 420 U.S. 918 (1975). The cross-appeals have been designated in this Honorable Court as Nos. 74-1151 and 74-1419. Respondent Freiman herein is an appellant and appellee in said cross-appeals, respectively.

(1973), the State of Missouri and its principal metropolitan area, the City of St. Louis, enacted various legislative and regulatory schemes designed to thwart and to circumvent the full impact of *Roe, supra*, and *Doe, supra*. The legislation challenged in Count II (Apx. pp. 14-17) was approved on July 16, 1973 and became effective on September 28, 1973.

Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152 provides in pertinent part for "(b)enefit payments for medical assistance . . . on behalf of those eligible needy persons" for "(f)amily planning services", but "shall not include abortions unless such abortions are medically indicated".

In the District Court proceedings petitioner stated under oath, dated January 15, 1974, in response to respondents' interrogatories nos. 1 and 2 (Apx. pp. 22-23) that,

> *"Answer to Interrogatory No. One*
>
> . . . For the months of September (after the 28th), October, November and December, 1973 no such payments were made."
>
> *"Answer to Interrogatory No. Two*
>
> 2. No definition or interpretation has been established for the phrase 'abortions medically indicated' and no determination has been made as to what medical symptoms, diagnoses, indications or justifications would qualify an abortion to be 'medically indicated'." (Apx. pp. 26-27).

In fact, not a single medical assistance payment was made for an abortion, although hundreds of applications had been submitted to petitioner, until subsequent to the Appellate Court ruling on December 31, 1974, reported at 508 F.2d 1211 (8th Cir. 1974). (Apx. pp. 65-73).

Respondents, each by separate affidavit dated February 18, 1974 and filed February 19, 1974 in the District Court, respectively verified and stated, in part,

"8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, or others under said defendant's supervision to the term 'abortions medically indicated'; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be 'medically indicated' under § 208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to § 208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments."

"9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but he and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in § 208.152 R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients." (Apx. pp. 31-32, 35-36).

On February 22, 1974 and in regard to Count II, petitioner duly filed his "Motion for Extension of Time and Suggestions in Support Thereof" and requested "an additional thirty days from February 25, 1974 through March 27, 1974" by reason,

> "(2) That plaintiffs have filed affidavits in connection with their Memorandum in Opposition to defendant Singleton's motion to dismiss and unless this court excludes such affidavits from its consideration, by Rule 12 (b)(6), Federal Rules of Civil Procedure, defendant should be granted a reasonable opportunity to present material in opposition to the material presented in the affidavits of plaintiffs. Such an extension may be granted pursuant to this court's Rule VIII(c)(4)" (*sic*, VII(c)(4) in the original).
>
> "(3) That Assistant Attorney General, Kermit W. Almstedt, contacted by telephone his client on the date of receipt of plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss and was informed that it would take approximately thirty days to compile the necessary data and information in order to contravene any allegations of fact raised in plaintiffs' affidavits."
>
> "(4) That the request for extension of thirty days is not made for any dilatory reason and should be an appropriate amount of time for defendant Singleton, through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, to file all necessary material in opposition to plaintiffs' affidavits filed in support of plaintiffs' Memorandum in Opposition to defendant Singleton's Motion to Dismiss." (Apx. p. 38).

Petitioner failed to file any such opposing materials or affidavits, either prior or subsequent to March 27, 1974.

Count II was dismissed by the District Court on May 31, 1974 "for lack of standing". (Apx. p. 53). Respondents duly filed their Notice of Appeal on June 28, 1974. (Apx. p. 63).

This cause was reversed on the merits by the United States Court of Appeals for the Eighth Circuit on December 31, 1974 and that opinion is reported at 508 F.2d 1211 (8th Cir. 1974). (Apx. pp. 65-73).

Respondents filed on January 2, 1975 a motion for rehearing seeking clarification of the Appellate Court's opinion and an award of counsel fees. (Apx. pp. 74-80). The Appellate Court, in a brief *per curiam* order filed January 9, 1975, clarified its prior and recent decision by limiting its scope to the precise issue raised by respondents. 508 F.2d at p. 1216. (Apx. pp. 81-82). Petitioner's "Motion for Stay of Mandate" (Apx. pp. 83-86) was filed on January 20, 1975 and denied by the Appellate Court on January 31, 1975. (Apx. p. 87).

Petitioner sought an extension of time during which to file his petition for writ of certiorari and the same was granted by the Honorable Harry A. Blackmun, Associate Justice, on March 26, 1975. (Apx. p. 88). Petitioner's petition for writ of certiorari was duly filed on May 6, 1975 and granted in limited fashion on June 23, 1975. 95 S.Ct. 2655, 45 L.Ed.2d 692 (1975). (Apx. pp. 89-90).

SUMMARY OF ARGUMENT

I

Respondents have adequate standing in their own right, independent of their patients, by reason of a basic right to freely practice medicine (*Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 [E.D. La. 1974], *affirmed*, 419 U.S. 1098 [1975]) and by reason of their economic interest (*Association of Data Processing Service Organizations, Inc.*, et al. v. *Camp*, etc., et al., 397 U.S. 150 [1970]). Physicians also demonstrate the necessary "logical nexus" (*Flast*, et al. v. *Cohen*, etc., et al., 392 U.S. 83 [1968]).

Respondents have standing, in addition, through the defense of their patients' basic fundamental rights. The right to terminate a pregnancy is a joint right of patient and physician (*Roe*, et al. v. *Wade*, etc., 410 U.S. 113 [1973]). There exists a pragmatic need for physicians to bear the brunt of litigation on behalf of their indigent patients and this surrogate standing has been allowed in an identical situation (*Roe*, et al. v. *Ferguson*, et al., 515 F.2d 279 [6th Cir. 1975]), in similar medicaid situations (*Seneca Nursing Home*, et al. v. *The Kansas State Board of Social Welfare*, et al., 490 F.2d 1324 [10th Cir. 1974], *cert. denied*, 419 U.S. 841 [1974]), and in analogous situations (*Bantam Books, Inc.*, et al. v. *Sullivan*, et al., 372 U.S. 58 [1963]).

Lastly, the factual circumstances herein are well within the recognized parameters of exceptions permitting constitutional *jus tertii* and standing may be sustained by the statutory overbreadth infringement of the patients' fundamental rights (*Bigelow* v. *Commonwealth of Virginia*, 95 S.Ct. 2222, 44 L.Ed.2d 600 [1975]).

II

The Appellate Court properly adjudicated the merits of the cause before it in a manner consistent with proper judicial economy and administration (*Hormel* v. *Helvering*, etc., 312 U.S. 552 [1941]). The matter before it was ripe for adjudication (*Levin* v. *Mississippi River Fuel Corp.*, et al., 386 U.S. 162 [1967]) and to have done otherwise would have created a manifest injustice contrary to established practice and logic (*Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 [2nd Cir. 1966], *cert. denied*, 385 U.S. 971 [1966]). The issue at hand had been previously and firmly decided in like manner. Three judges, pursuant to 28 U.S.C. 2281, were neither required nor indicated (*Gonzalez* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90 [1974]).

The issues had been fully and properly raised below and, in fact, petitioner had chosen to waive his right to contest them.

ARGUMENT

I

A Sufficient Logical Nexus Exists Between the Status of Respondent-Physicians and the Claims They Seek to Have Adjudicated, So as to Confer Standing Upon Them to Challenge the Constitutionality of Section 208.152, Missouri Revised Statutes, (Supp. 1973).

A. **Introduction.**

Although this Honorable Court limited the issue of standing on certiorari to the question of "logical nexus" (Apx. p. 89), petitioner has expanded this issue to include the question of "zone of interest" within his *Brief*. (Ptn. Br. p. 2, *et seq.*). Respondents, accordingly shall discuss both facets of standing.

B. **The adequate standing of respondent-physicians in their own right, independent of the rights of their pregnant, indigent patients.**

1. *The Right to Freely Practice Medicine: "The statute interferes with the appellants' (respondents) practice of medicine . . . professionally . . .". Wulff, supra,* 508 F.2d at p. 1214. (Apx. p. 69).

The Eighth Circuit has previously noted in a case brought by physicians against a public hospital's refusal to allow abortions,

> "We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions.

Justice Blackmun writing for the Court in Roe v. Wade, *supra* at 163, of 410 U.S. at 732 of 93 S.Ct. stated:

> (F)or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."
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> "The impact of the court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women. Neither can these opinions be read so narrowly as to accord standing only to a physician threatened with criminal prosecution. *See* Doe v. Bolton, *supra*, at 188-189 of 410 U.S., 93 S.Ct. 739. Clearly the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed.2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D.Iowa 1973) (3 judge court); Freeman & Bass, P.A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)." *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342, 1344 (8th Cir. 1974).[2]

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[2] *Cert. denied*, 419 U.S. 891 (1974).

Similarly, it is an aspect of the physician's general liberty under the Fourteenth Amendment to practice his chosen profession free from unconstitutional restraint.[3] The right to practice medicine has consistently been protected by the federal courts. In *United States v. Freund*, 290 Fed. 411 (D.Mont. 1923), the court invalidated a Prohibition Act which restricted the amount of alcohol a physician could prescribe,

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice." 290 Fed. at p. 414.[4]

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts lapsed into desuetude.[5]

Even more compelling is this Honorable Court's treatment of this very issue in the historic cases of *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973), wherein the latter it was stated,

> "(T)he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a

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[3] See, *Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 (E.D.La. 1974), *affirmed*, 419 U.S. 1098 (1975).

[4] Cited with approval by dissenting Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 758 (N.D.Ohio 1970).

[5] See, *e.g.*: *United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L.Hand,J.); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, J.); *Davis*, et al. v. *United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corporation, Inc.* v. *C. I. Lee & Co., Inc.*, et al., 45 F.2d 103 (2d Cir. 1930) (Swan, J.); and *Bours v. United States*, 229 Fed. 960 (7th Cir. 1915).

> justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." 410 U.S. at p. 188.

The principle of physicians' standing in abortion regulation cases has not been limited by the federal courts merely to those statutes invoking criminal sanctions for noncompliance. The same principle has been applied equally to cases such as here, where the non-criminal regulation interferes with the protected physician-patient relationship and unconstitutionally inhibits the free election and/or effectuation of an abortion.[6]

Respondents maintain that their standing is ample and sufficient in this cause. Respondents' claim is primarily based upon the interference here by the state in the constitutionally protected area of the decision regarding abortion between a patient and her physician. The procedure of abortion cannot be viewed in the same light as other medical and surgical procedures. It alone has been afforded constitutional guarantees.

Although petitioner has chosen to ignore these cases dealing with analogous acts by state governments to discourage and to prevent the full exercise of abortion-related rights, they are relevant, persuasive and unanimous. Petitioner does not cite a single case holding that physicians, in either a criminal

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[6] See, *e.g.*: *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F. 2d 756 (7th Cir. 1973); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 [1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387 (S.D.Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975); and *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 (E.D.N.C. 1974).

or a non-criminal, abortion-related matter, did not possess the requisite standing.[7]

2. *Economic Interests: "The statute interferes with the appellants' (respondents) practice of medicine . . . monetarily."* (*Wulff, supra,* 508 F.2d at p. 1214). (Apx. p. 69).

As the Eighth Circuit readily discerned in *Nyberg, supra* at fn. 6,

> "Furthermore, the practical effect of the stringent limitation . . . for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests." 495 F.2d at p. 1344.

The financial effect upon respondents under the challenged Medicaid payment statute is certainly more direct and immediate than the situation in *Nyberg, supra,* which dealt with the particular medical facility in which abortions could be performed.

As simply stated by the Appellate Court below,

> "We think that there is no question that (1) appellants allege that the challenged acts have caused them 'injury in fact, economic or otherwise' and (2) 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830, 25 L.Ed. 2d 184 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action." 508 F.2d at p. 1214. (Apx. pp. 69-70).

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[7] For a similar holding on physician standing in the related field of contraception, see the recent decision in *Population Services International,* et al. v. *Wilson,* et al., — F.Supp. — (S.D.N.Y. 1975).

This type of a financial "standing" interest has been held sufficient, time and time again, by this Honorable Court.[8]

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F.2d 608, 616; *Office of Communication of United Church of Christ* v. *FCC,* 123 US App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District* v. *Schempp,* 374 U.S. 203. We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case."
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> "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a

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[8] See, *e.g.*: *Association of Data Processing Service Organizations, Inc.,* et al. v. *Camp,* etc., et al., 397 U.S. 150, 151-156 (1970); *Arnold Tours, Inc.,* et al. v. *Camp,* et al., 400 U.S. 45, 46 (1970); and *Investment Company Institute,* et al. v. *Camp,* etc., et al., 401 U.S. 617, 620-621 (1971).

newcomer into the business, because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition. *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83-84." *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at pp. 153-154.

Fifty years ago, this Honorable Court held that the economic loss to befall private schools, by a law requiring all children to attend only public schools, was ample grounds for standing. *Pierce*, etc., et al. v. *Society of Sisters*, 268 U.S. 510, 535-536 (1925).

Respondents' injury is clear and actual, as evidenced by their affidavits (Apx. pp. 29-36) and the Appellate Court's finding below of allegations that "the challenged acts have caused them 'injury in fact, economic or otherwise'." 508 F.2d at p. 1214. (Apx. pp. 69-70). Respondents' injury far exceeds the enunciated standard of being "arguably within the zone." *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at p. 153.

Regardless of actual injury, this Honorable Court has held that potential injury is sufficient for standing.[9]

As stated by one commentator,

> "If plaintiff did not have the minimal personal involvement and adversement which Article III requires, he would not be engaging in the costly pursuit of litigation."[10]

As noted recently by the Eighth Circuit, the concept of standing remains in many ways as described 24 years ago.

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[9] See, *Warth*, etc., et al. v. *Seldin*, et al., 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343, 354-355 (1975); and *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at p. 154.

[10] Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

> "Standing doctrine was described in 1953 as 'a complicated speciality of federal jurisdiction, the solution of whose problem is . . . more or less determined by the specific circumstances of individual situations . . .' United States v. Federal Power Commission, 345 U.S. 153, 156, 73 S. Ct. 609, 612, 97 L.Ed. 918 (1953) (Frankfurter, J.). Since 1953 the doctrine has evolved considerably. Whether that evolution be toward greater complexity or simplicity is disputed by commentators."[11]

One commentator suggests that the concept of injury in fact to sustain standing 'has been so diluted that even the most trivial interest will suffice."[12] A recent Ninth Circuit case allowed standing to an individual exposed to breathing "air less pure than that mandated by the Clear Air Act."[13] Respondents possess the elements of standing far in excess of whatever the minimum parameters may be.

3. *A Logical Nexus.*

Respondents, as so found by the Appellate Court below, clearly meet the standard prescribed by *Flast*, et al. v. *Cohen*, etc., et al., 392 U.S. 83, 102 (1968), that there exists "a logical nexus between the status asserted and the claim sought to be adjudicated." Assuming, *arguendo*, the fact that hypothetical

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[11] *Coalition for the Environment*, et al. v. *Volpe*, et al., 504 F.2d 156, 164 (8th Cir. 1974).

[12] Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1382 (1973).

[13] *Natural Resources Defense Council, Inc.*, et al. v. *United States Environmental Protection Agency*, 507 F.2d 905, 910 (9th Cir. 1974). See, also, *West Coast Construction Company, Inc.* v. *Oceano Sanitary District*, et al., 311 F.Supp. 378, 380-382 (N.D.Cal. 1970), in which plaintiff held to have standing to challenge governmental body's use of federal funds in defending plaintiff's state court action against it.

plaintiffs may exist, who have standing in this cause and even a greater "logical nexus," does not preclude respondent-physicians from maintaining their own and distinct requisite standing.

This Honorable Court in *Flast, supra,* stated,

> "The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be non-justiciable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between status asserted and the claim sought to be adjudicated." 392 U.S. at pp. 101-102.

The necessary and logical nexus of respondent-physicians clearly is present within their professional practice, within their professional relationship with their patients, within their concern for their patients' health and rights and within their financial concerns. As noble as the medical profession may be, it is nevertheless a means of livelihood for physicians. They have a direct and ascertainable pecuniary interest in receiving payment for services rendered. Medicaid assistance payments are "made *on behalf* of those eligible needy persons." (Section 208.152, Mo. R.S. [Supp. 1973]). (Emphasis supplied). Payment is not made to the patient but directly to the doctor who renders the medical service.

The financial stake of respondents far exceeds the *de minimus* economic interest of plaintiff Florence *Flast, supra* at p. 15. The true motivating force for both Flast and respondents herein is the preservation of fundamental constitutional rights. Respondents respectfully suggest that their interests in these pro-

ceedings are motivated other than as so derogatorily suggested by petitioner in his brief.

> "The respondent-physicians are seeking to expand the range of circumstances which will, in the future, enable them to feed at the public trough." (Ptn. Br. p. 11).

Respondents unquestionably not only allege but possess "a personal stake in the outcome of the controversy as to assure that concrete adverseness," so necessary for the resolution of constitutional questions.[14]

A parameter of "logical nexus" has never been that the complaining party be a member of the class "excluded"[15] or of the class "affected"[16] in order to have requisite standing. The fact that indigent welfare women may have a clearer or more direct claim of standing in no manner diminishes the rightful standing claims of respondent-physicians.

> "There are no better or worse plaintiffs, only those with or without a claim."[17]

C. **The standing of respondent-physicians to assert the rights of their pregnant, indigent patients.**

1. *The Inseparability of the Physician-Patient Relationship in the Abortion Context.*

The vitality of the doctor-patient relationship does not permit its dichotomy into two component parts. This is particu-

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[14] *Baker,* et al. v. *Carr,* et al., 369 U.S. 186, 204 (1962)

[15] *Taylor* v. *Louisiana,* 419 U.S. 522, 526 (1975).

[16] *Stanton* v. *Stanton,* 95 S.Ct. 1373, 1376, 43 L.Ed.2d 688, 693 (1975).

[17] Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425, 426 (1974).

larly true in the area of abortion, where this Honorable Court placed great emphasis upon the physician in stating that,

> "(F)or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Roe, supra* at p. 10, 410 U.S. at p. 163.

Only an appropriately safeguarded medical judgment was afforded constitutional protection by this Honorable Court in *Roe* and *Doe*, *supra* at p. 10. Retroactivity of those decisions has been granted to physicians[18] but denied to non-physicians.[19]

As early as 1971 the federal court in *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385, 1387-1388 (N.D.Ill. 1971) held,[20]

> "(T)he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings. All plaintiffs thus have standing to raise the claims which they assert."

Numerous other federal courts have specifically held that physicians have the necessary standing to assert the constitutional rights of their patients in the abortion context.

> "Moreover, the violations of their constitutional rights alleged by plaintiff-physicians are closely interwoven with

[18] *United States* ex rel. *Williams, II*, v. *Preiser*, etc., et al., 497 F.2d 337 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1058 (1974). *Vuitch* v. *Hardy*, etc., 473 F.2d 1370 (4th Cir. 1973), *cert. denied*, 414 U.S. 824 (1973).

[19] *Cheaney* v. *State of Indiana*, 259 Ind. 138 (1972), 285 N.E. 2d 265, *cert. denied*, 410 U.S. 991 (1973).

[20] *Vacated and remanded* sub nom. *Hanrahan*, etc. v. *Doe*, et al., 410 U.S. 950 (1973).

> and inseparable from the allegations they make on behalf of their women patients for violations of their constitutional rights."
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> "Thus, it is appropriate here to grant plaintiff-physicians standing to litigate the alleged deprivations of the constitutional rights of their women patients."[21]

Physicians have previously been found by this Honorable Court to have standing to protect their patients rights to use[22] and to have access[23] to contraception.

In the analogous situation of the attorney-client relationship it has been held that,

> "(A) lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."[24]

2. *The Necessity for the Physicians' Assertion of Patients' Rights.*

Respondents have not only the right but perhaps as well the professional and moral obligation to protect the rights of their

[21] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler*, etc., 342 F.Supp. 1048, 1055 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974). See, also, *Crossen*, et al v. *Breckenridge*, etc., et al., 446 F.2d 833, 840 (6th Cir. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

[22] *Griswold*, et al. v. *Connecticut*, 381 U.S. 479, 481 (1965).

[23] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 443-446 (1972). *Population Services International*, et al., *supra* at fn. 7.

[24] *Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281, 1284 (8th Cir. 1974).

patients. Certainly, the prospect of a single, indigent pregnant woman judicially challenging the statute through the various appellate levels of federal proceedings, in order to recover a $75.00 reimbursement to her physician, is formidable, if not herculean. By the very nature of her defined indigency, she would be forced to rely upon the charity and gratuity of counsel. Court fees and out-of-pocket expenses alone would vastly exceed the amount of recovery sought. She would be subject to "harassment due to the controversial nature of the subject matter of this action."[25] This consideration of the issue of standing has been previously recognized by this Honorable Court.

> "Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringement of freedom of the press may too often go unremedied. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459."[26]

As the Seventh Circuit has noted in the abortion context,

> "It is not at all inconceivable that women who seek abortions will be dissuaded from challenging restrictions on their right to one during the first trimester, . . . This would then leave unchallenged, except for the efforts of

[25] *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 542 at fn. 1 (8th Cir. 1975).

[26] *Bantam Books, Inc.*, et al. v. *Sullivan*, et al., 372 U.S. 58, 65 at fn. 6 (1963).

> these plaintiffs, the allegedly impermissible restrictions on a pregnant woman's right of privacy."[27]

Such a situation is even more conceivable under the circumstances of the case at bar, where the class of pregnant women is, by definition, indigent and frequently lack formal education, sophistication and the other badges of indigency; all of which would discourage attempts to vindicate judicially the deprivation of their constitutional rights.

In addition to the unanimous appellate panel's holding below of the standing of respondent-physicians (508 F.2d at pp. 1213-1214) (Apx. pp. 68-70), an unanimous appellate court panel within the Sixth Circuit has affirmed the District Court's ruling that physicians have standing when challenging the exclusion of state medicaid for the payment of abortion.[28]

> "With regard to the standing of the plaintiff physicians, recent cases have settled the right of physicians in the practice of medicine to assert their constitutional rights to advise and perform abortions for indigent women. Doe v. Bolton, 410 U.S. 179, 187-89, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). Crossen v. Breckenridge, 446 F.2d 833, 839-40 (6th Cir. 1971). That plaintiff physicians in this case are not threatened with criminal prosecutions does not compel a different result. Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974); Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974)." 515 F.2d at p. 281.

The necessity and desirability of protecting the rights of a class, by allowing suit to be brought by another injured party,

[27] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1148 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[28] *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387, 388 (S.D. Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975).

has been allowed in cases where an organization has litigated on behalf of its members.[29] The compelling reason of preserving anonymity applies equally as well here.

Identically, standing has repeatedly been granted to providers of medical services when challenging the state's administration of the federal grant program establishing state medical assistance programs under 42 United States Code, Section 1396, *et seq.*

> "(P)laintiffs as recipients of payments would have standing for themselves and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for."[30]

Certainly, no valid distinction may be drawn between medical institutions and individual physicians, as recipient payees of the program and as providers of services, when analyzed for the purposes of standing on behalf of their indigent patients.

Petitioner fails to cite a single instance in which physicians have been held not to have standing on behalf of their patients to raise the constitutional rights of the latter within the medical sphere.

3. *The General Exceptions Permitting Constitutional* Jus Tertii.

It has been suggested in regard to the concept of *jus tertii*,

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[29] See, *e.g.*: *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U. S. 449, 459-460 (1958); and *National Motor Freight Traffic Association, Inc.*, et al. v. *United States*, et al., 372 U.S. 246, 247 (1963).

[30] *Seneca Nursing Home*, et al. v. *The Kansas State Board of Social Welfare*, et al., 490 F.2d 1324, 1329 (10th Cir. 1974), *cert. denied*, 419 U.S. 841 (1974). See, also: *Harmony Nursing Home, Inc.* v. *Anderson*, etc., et al., 341 F. Supp. 957, 959 (D. Minn. 1972); and *Massachusetts General Hospital* v. *Rate Setting Commission*, et al., 359 Mass. 157 (1971), 269 N.E.2d 78.

> "Three considerations, none of which is of controlling significance, seem to recur: first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders' asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted."[31]

Respondents suggest that, although any one of the three may sustain *jus tertii*, in fact, all have been demonstrated, *supra*, to be sufficient and manifest in this cause.

4. *Standing By Virtue of the Statute's Overbreadth.*

This Honorable Court has consistently held claimants to have standing when challenging statutes as overbroad in the area of First Amendment rights. *Bigelow* v. *Commonwealth of Virginia*, 95 S.Ct. 2222, 2229-2230, 44 L.Ed.2d 600, 608-609 (1975). Such attacks have also been permitted outside the "free speech" context. *Aptheker*, et al. v. *Secretary of State*, 378 U.S. 500 (1964), involved passport regulations, and *Berger* v. *New York*, 388 U.S. 41 (1967), involved electronic searches.

The right to an abortion has been recognized as a basic fundamental right (*Roe, supra* at p. 10, 410 U. S. at p. 155) and the extension of standing to physicians as a result of the challenged statute's overbreadth, when applied to their indigent patients, is natural, logical and warranted. Unques-

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[31] NOTE, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 425 (1974): Citing *Eisenstadt, supra* at fn. 23, *Griswold, supra* at fn. 22 and *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449 (1958) for the first; citing *Eisenstadt* and *NAACP, id.* for the second; and citing *Eisenstadt, id., Griswold, id.*, and *Barrows*, et al. v. *Jackson*, 346 U.S. 249 (1953) for the third consideration.

tionably, the challenged statute is facially overbroad by reason of its failure to exclude the period of gestation prior to viability (*Roe, id.*, 410 U.S. at p. 164) and respondent-physicians, accordingly, have standing by reason of the challenged legislation's overbreadth.

5. *Petitioner's Counter-Arguments*

Petitioner maintains that the tests to measure standing "have become increasingly exclusive during the last decade and a half." (Ptn.Br. pp. 6, 11). Overwhelmingly, commentators disagree.[32] Petitioner argues that the challenged statute "includes no restriction on the performance of abortions by licensed physicians and surgeons." (Ptn.Br. p. 10). Such a view is not only myopic but unrealistic.

> "As the Supreme Court made clear in Doe v. Bolton, it is not only complete proscription of abortion which is unconstitutional, but barriers which 'unduly restrict' the rights of the woman, *see* 410 U.S. at 198, 93 S.Ct. 755." *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).
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> "The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance."
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> "The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice."[33]

Petitioner's attempt to analogize respondent-physicians to patients' landlords falls flat (Ptn.Br. at p. 21) and cavalierly ignores the traumatic realities of an unwanted pregnancy. *Roe, supra* at p. 10, 410 U.S. at 153.

As so aptly stated by this Honorable Court,

> "(C)onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.' "[34]

While the challenged statute is void of criminal sanctions, this state of affairs is not synonymous with petitioner's state-

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[32] See, *e.g.*: Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 487-488 (1972); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380-1383 (1973); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L. J. 425, 473-476; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645-646 (1973); and NOTE, *Standing to Assert Constitutional Jus Tertii*, 88 HARV.L.REV. 423, 425, 427 (1974).

[33] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan* v. *Klein*, et al., 412 U.S. 924 (1973).

[34] *Cooper*, et al. v. *Aaron*, et al., 358 U.S. 1, 17 (1958).

ment that "(i)t does not provide sanctions against anyone, including respondents". (Ptn.Br. p. 17). The sanction of non-payment and the interference inflicted by this fact, upon the patient's hesitancy and/or inability to seek medical assistance in the first instance and upon the physician-patient relationship once initiated, is self-evident. The sanctions imposed by the challenged statute upon the pregnant indigent woman were best stated by the unanimous District Court panel in New York.[35]

Petitioner relies heavily on the fact that administrative remedies are statutorily provided by the State of Missouri only to respondents' patients and not to respondents themselves. (Ptn. Br. p. 22). This argument ignores the jurisdictional basis of 42 United States Code, Section 1983 of this action (Apx. p. 10) and the right of the welfare recipients to bypass administrative relief and seek direct relief in federal court from a denial of equal protection.[36]

Petitioner finally relies extensively on the recent decision of this Honorable Court in *Warth*, etc., et al. v. *Sedlin*, et al., 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). (Ptn.Br. pp. 23-29). No rational parallels can be drawn between respondents and the four classes of plaintiffs in *Warth, supra.*

a. Plaintiffs Ortiz, *et al.*, were held to,

> "(R)ely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."[37]

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[35] *Klein*, et al., *supra* at pp. 24-25.

[36] See, *e.g.*: *Damico*, et al. v. *California*, et al., 389 U.S. 416, 417-418 (1967); and *Hagans*, et al. v. *Lavine*, etc., et al., 415 U.S. 528, 536 (1974). See, also, cases at fn. 30, *supra.*

[37] 95 S.Ct. at pp. 2209-2210, 45 L.Ed.2d at p. 360.

Respondents in this cause have specifically alleged in their "Complaint" (Apx. pp. 9-17) and their "Affidavits"[38] (Apx. pp. 29-36) past injury to themselves and to their patients through actual refusals by petitioner to pay for abortion procedures; as well as continuing injury through petitioner's perpetuation of said policies pursuant to the challenged statute.

b. Plaintiff taxpayers of Rochester, New York, did not allege nor show,

> "(T)hat the challenged . . . ordinance . . . preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated . . . (that a) relationship, other than an incidental congruity of interest, . . . exist between the Rochester taxpayers and persons who have been precluded . . . (and) that their prosecution of the suit is necessary to insure protection of the rights asserted . . ."[39]

Respondents in this cause specifically allege in paragraph 9, subsections (b), (e) and (g) of their "Complaint" (Apx. pp. 12-13) and paragraphs 8 and 9 of their "Affidavits" (Apx. pp. 31-32, 35-36) the affect of the challenged statute upon the physician-patient relationship (a relationship unquestionably greater than an "incidental congruity of interest"). The patent desirability of allowing respondent-physicians to pursue these rights has been more fully explored, *supra.*[40]

c. Plaintiffs Metro-Act of Rochester, Inc., *et al.* attempted "to raise putative rights of third parties" and did,

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[38] For the propriety of reliance upon such "Affidavits", distinct from the "Complaint", see *Warth, supra*, 95 S.Ct. at pp. 2206-2207, 45 L.Ed.2d at p. 356.

[39] *Warth, supra*, 95 S.Ct. at p. 2211, 45 L.Ed.2d at p. 361.

[40] See, pp. 19-22, *supra.*

> ". . . not allege that a contractual or other relationship . . . existed between its Penfield members and any particular person excluded . . . nor that any such relationship was either punished or disrupted . . ."[41]

Respondents in this cause have not only a contractual relationship with their patients but a relationship exposing them to civil liability for malpractice should they negligently err in their treatment; regardless of whether respondent-physicians were paid by their patients for the services rendered or whether the patients incurred an obligation to pay.[42] The deleterious effect of the challenged statute has been previously referred to and is set out in paragraph 9, subsections (b), (e) and (g) of respondents' "Complaint" (Apx. pp. 12-13) and paragraphs 8 and 9 of their "Affidavits". (Apx. pp. 31-32, 35-36).

d. Plaintiff Home Builders failed to allege "monetary injury to itself"[43] and the damage claims of its members were "not common to the entire membership, nor shared by all in equal degree."[44] Plaintiff Penfield Better Homes Corporation alleged no facts to evidence "a live, concrete dispute" in 1972 when suit was filed, although such a claim may well have existed in 1969.[45]

Respondents in this cause do not prosecute this action within an organizational guise and the past, pending and prospective damage and injury to respondent-physicians, their patients and their mutual relationship is both real and manifest.

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[41] *Warth, supra*, 95 S.Ct. at p. 2213 and 2213 at fn. 22, 45 L.Ed. 2d at p. 364 and 364 at fn. 22.

[42] *Persten v. Chesney*, et al., 212 S.W.2d 469, 473 (Mo. Ct. App. 1948).

[43] *Warth, supra*, 95 S.Ct. at p. 2214, 45 L.Ed.2d at p. 364.

[44] *Ibid.*

[45] *Warth, supra*, 95 S.Ct. at pp. 2214-2215, 45 L.Ed.2d at pp. 365-366.

Lastly, petitioner callously suggests that respondents' interest is purely economic as potential "recipient of public funds paid out in support of optional surgical processes", similar in degree to "silicone transplants". (Ptn.Br. p.29). This Honorable Court in *Roe* and *Doe, supra* made clear that termination of a pregnancy was far removed from the general class of elective, cosmetic surgery.[46]

> "(P)regnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance."[47]

II

The Court of Appeals Did Not Act in Excess of Its Jurisdiction When It Proceeded to Determine on the Merits the Constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973).

A. Introduction.

Respondents do not quarrel with the general principles of law cited by petitioner, that ordinarily matters will not be reached on appeal that have not been decided below and that ordinarily constitutional questions should not be first considered on appeal. (Ptn. Br. p. 34). Nevertheless, even in the very cases cited by petitioner for the former rule, it was clearly recognized that the principle is not an absolute one, but only one applied "ordinarily" (*Eureka-Carlisle Company* v. *Rottman*, etc., 398 F.2d

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[46] *Roe, supra* at p. 10, 410 U.S. at p. 153.

[47] *Klein, supra* at fn. 33, 347 F.Supp. at p. 500.

1015, 1019 [10th Cir. 1968]), one the court may choose to "decline" (*Equal Employment Opportunity Commission* v. *Standard Forge and Axle Company, Inc.*, 496 F.2d 1392, 1394 [5th Cir. 1974]) and one to be discretionally not "considered" when "not presented to the court below" (*Fitts* v. *United States of America*, 376 F.2d 516 [10th Cir. 1967]). (All cited by petitioner in Ptn. Br. p. 34). In each of the cases cited by petitioner the issue in question had neither been raised nor presented to the District Court nor considered by it. Contrarily, in the instant case the merits were raised and presented directly to the District Court, which chose not to confront them by avoiding them through a collateral ruling on standing.

In *Equal Employment Opportunity Commission, supra,* the Appellate Court reversed the District Court and the need to rule upon the issue presented by appellant was thereby obviated. 496 F.2d at p. 1394. In *Eureka-Carlisle Company, supra,* the Appellate Court noted that the issue presented by appellant had been specifically waived at oral argument. 398 F.2d at pp. 1019-1020.

Similarly, in *Giordano v. United States*, 394 U.S. 310 (1969), *Bandy* v. *United States of America*, 396 F.2d 929 (8th Cir. 1968), *cert. denied*, 393 U.S. 1004 (1968), and *Gardner*, etc. v. *Meyers*, et al., 491 F.2d 1184 (8th Cir. 1974), all cited by petitioner for the latter rule (Ptn. Br. p. 34), the constitutional issue was never raised nor presented to the District Court.[48] In the present cause the constitutional issue was squarely and exclusively before the District Court, which chose not to decide it.

The Appellate Court below correctly chose to rule upon the merits before it and in so doing properly applied the applicable principles of law to the pressing and peculiar circumstances be-

[48] Respondents express serious doubts as to whether *Giordano, supra,* supports even the general principle for which cited by petitioner.

fore it. Petitioner fails to discuss the frequently recognized and applied exceptions to the hornbook law which he seeks to utilize in blanket fashion in this cause. The authority of appellate courts to decide issues left unresolved by lower courts is equally well recognized.

This Honorable Court, as early as 1941, acknowledged that,

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."
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> "But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions . . . the power to modify, reverse or remand decisions not in accordance with law 'as justice may require.' There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."
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> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been

specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."[49]

The existence of recognized exceptions to the general "black-letter" rule, when circumstances and justice dictate, has been recognized by every Appellate Circuit.[50]

B. **The factors to be considered.**

What becomes readily apparent from a review of the cases is that the power to consider points of law and/or fact upon ap-

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[49] *Hormel* v. *Helvering*, etc., 312 U.S. 552, 556-557 (1941). See, *Adickes* v. *S. H. Kress & Company*, 398 U.S. 144, 147 at fn. 2 (1970); and *Anderson*, et al. v. *United States*, 417 U.S. 211, 217 at fn. 5 (1974).

[50] *Securities and Exchange Commission*, et al. v. *Milner*, etc., et al., 474 F.2d 162, 166 (1st Cir. 1973); *Dobb*, etc. v. *Baker*, et al., 505 F.2d 1041, 1044 (1st Cir. 1974); *Shapiro, Bernstein & Co., Inc.*, et al. v. *Continental Record Co., Inc.*, 386 F.2d 426, 427 (2nd Cir. 1967); *Green* v. *Brown*, et al., 398 F.2d 1006, 1009 (2nd Cir. 1968); *Kohn*, etc., et al. v. *American Metal Climax, Inc.*, et al., 458 F.2d 255, 262 (3rd Cir. 1972), *cert. denied*, 409 U.S. 874 (1972); *O'Neill*, et al. v. *United States of America*, 411 F.2d 139, 143-144 (3rd Cir. 1969); *Toyomenka, Inc.*, et al. v. *Mount Hope Finishing Company*, 432 F.2d 722, 727 at fn. 10 (4th Cir. 1970); *McDougall* v. *Dunn*, 468 F.2d 468, 476 (4th Cir. 1972); *Empire Life Insurance Company of America* v. *Valdak Corporation*, 468 F.2d 330, 334 (5th Cir. 1972); *Evans*, et al. v. *Triple R Welding & Oil Field Maintenance Corporation*, 472 F.2d 713, 716 (5th Cir. 1973); *City of Memphis, Tennessee* v. *Southern Bell Telephone and Telegraph Company*, 316 F.2d 535, 537 (6th Cir. 1963); *United States of America* v. *Whitehead*, 424 F.2d 446, 448 (6th Cir. 1970); *United States of America*, etc. v. *The Home Indemnity Company*, et al., 489 F.2d 1004, 1007 (7th Cir. 1973); *Johnson*, et al. v. *United States*, 434 F.2d 340, 342 (8th Cir. 1970); *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1350 (8th Cir. 1974); *Krause*, etc. v. *Sacramento Inn*, et al., 479 F.2d 988, 989-990 (9th Cir. 1973); *K-2 Ski Company v. Head Ski Co., Inc.*, et al., 506 F.2d 471, 475 (9th Cir. 1974); *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970); *E.F. Corporation* v. *Smith*, etc., 496 F.2d 826, 829 (10th Cir. 1974); *In re Elmore*, 382 F.2d 125, 127 (D.C.C. 1967); and *Miller* v. *Avirom*, 384 F.2d 319, 322-323 (D.C.C. 1967).

peal, even though the same may not have been pressed upon the trial court as they were hereinbelow, lies largely within the discretion of the appellate court. Respondents submit that the circumstances of this cause below manifestly confirm the appropriateness and correctness of the Appellate Court's actions. Of equal weight to those principles of law suggested by petitioner is the fact that,

> "It is well established that as a matter of discretion, an appellate court may pass upon issues not pressed before it or raised below when the ends of justice will be best served by doing so."[51]

The applicable rule of law has always been that,

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. . . . once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done."[52]

An appellate court's decision to consider the merits of the case upon appeal, although not decided below, is a matter of judicial discretion and is "not a limit on jurisdictional power."[53]

1. *The Summary Judgment Nature of the Proceedings.*

Appellate courts have frequently decided questions on the merits, although not decided below, when the issues were appropriate for summary-type judgment proceedings and no fac-

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[51] *Empire Life Insurance*, etc., *supra* at fn. 50, 468 F.2d at p. 334.

[52] 9 MOORE'S FEDERAL PRACTICE 273 (Cum. Supp. 1974).

[53] *Mercury Motor Express, Inc.*, et al. v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973).

tual matters were in dispute. Appellate courts may determine independently that no genuine issues of fact exist.[54]

> "We believe an appellate court has the power to order summary judgment for appellant . . . where he made no motion . . . in the trial court . . ." 6 *Moore's Federal Practice*, 2977 (Cum.Supp. 1974).

It is appropriate to consider matters on appeal when "a pure question of law is involved".[55]

It has long been a general rule of law that appellate courts in cases involving clear and unequivocal issues, capable of only a singular determination, may decide the matter on the merits rather than remanding the same.

In *Levin* v. *Mississippi River Fuel Corp.*, et al., 386 U.S. 162 (1967) involving a construction of Missouri state law and which arose within the Eighth Circuit, this Honorable Court stated,

> "Indeed, this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." 386 U.S. at pp. 169-170.

In *Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 (2nd Cir. 1966), *cert. denied*, 385 U.S. 971 (1966), a case on appeal from an order denying plaintiffs' request for a preliminary injunction, the Court of Appeals reversed, holding for plaintiffs on the merits.

> "As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court

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[54] *Capital Temporaries, Inc. of Hartford*, et al. v. *The Olsten Corporation*, 506 F.2d 658, 667 (2nd Cir. 1974).

[55] *Evans*, et al., *supra* at fn. 50, 472 F.2d at p. 716.

> will go no further into the merits than is necessary to decide the interlocutory appeal. See Ex parte National Enameling & Stamping Co., 201 U.S. 157, 162, . . . However, this rule is subject to a general exception—the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. See, e.g., Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495, . . ."
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> "Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pretrial stage. In Meccano, Ltd. v. John Wanamaker, 250 F. 450 (2 Cir. 1919), aff'd, 253 U.S. 136, 141-142, 40 S.Ct. 453, 64 L.Ed. 822 (1920), we expressly refused to pass upon this question because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable, we conclude that we may direct the entry of a judgment for the plaintiffs here." 364 F.2d at p. 70.

In point is *The Board of Managers of the Arkansas Training School for Boys at Wrightsville*, et al. v. *George*, et al., 377 F.2d 228 (8th Cir. 1967), *cert. denied*, 389 U.S. 845 (1967). The Appellate Court decided the merits on appeal and held,

> "It would clearly be a 'contradiction of reason' to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. Moreover it is not necessary to attack statutes by specific pleading which on their face are

unconstitutional. Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762."

"We are also mindful that the present appeal comes to us on a motion to dismiss with a limited record. Appellant has not even filed its answer. We adhere to the proposition that it would be improper to consider 'grave constitutional questions' where there exists 'reasonable likelihood' that further proceedings could help clarify the issues. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for 'refinement or clarification of issues.' United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; United States v. Fabro, Inc., M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies 'as expeditiously as is consistent with proper judicial administration.' Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed2d 762." 377 F.2d at p. 231.

Similarly, is *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974), in which a unanimous panel similarly ruled statutory abortion restrictions to be facially unconstitutional, although the cause below had been dismissed without a ruling on the merits.

> "The issue in this case relates to the facial constitutionality of the St. Louis city ordinance when viewed against the backdrop now available in the *Roe* and *Doe* decisions. That determination can be made on the record before us. We choose to make that determination. *See*, Wisconsin v. Constantineau, *supra* at 439 of 400 U.S., 91 S.Ct. 507; Baggett v. Bullitt, 377 U.S. 360, 375-379, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964)." 495 F.2d at p. 1350.

Appellate Courts have also ruled on the merits when considering the appropriateness of interlocutory relief and when

the issues were capable of legal resolution as then spread upon the record.[56]

The Appellate Court below correctly viewed the cause as involving strictly legal issues and thus appropriate for decision. In nine other federal suits challenging identical legislation in other states, summary disposition of the issues has occurred.[57] Petitioner cites not one case to the contrary.

2. *The Clarity of the Principle.*

Prior to the decision by the Appellate Court below on December 31, 1974, fifteen federal judges had held identical statutes in five other states unconstitutional (with only a single dissent being recorded), on the identical ground of equal protection denial under the Fourteenth Amendment.[58] Subsequent

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[56] *Aerojet-General Corporation* v. *The American Arbitration Association*, 478 F.2d 248, 252-253 (9th Cir. 1973); and *Kohn*, *supra* at fn. 50, 458 F.2d at p. 270.

[57] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496, 498 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan* v. *Klein*, et al., 412 U.S. 924 (1973); *Doe*, et al. v. *Rose*, etc., 380 F. Supp. 779, 781 (D.Utah 1973), *affirmed*, 499 F.2d 1112, 1114 (10th Cir. 1974); *Doe* v. *Rampton*, et al., 366 F.Supp. 189, 192 (D. Utah 1973); *Doe*, et al. v. *Wohlgemuth*, et al., 376 F. Supp. 173, 177-178 (W.D. Penn. 1974), *affirmed on other grounds* sub nom. *Doe*, et al. v. *Beal*, etc., et al., — F.2d — (3rd Cir. 1975), *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387, 388 (S.D.Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975); *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143, 1144 (D.S.D. 1974), *vacated and remanded on other grounds*, 420 U.S. 968 (1975); *Doe*, et al. v. *Myatt*, et al., —F.Supp. —(D.N.D. 1975); *Smith*, et al. v. *Tinder*, —F.Supp. — (S.D.W.V. 1975); and *Doe*, et al. v. *O'Bannon*, et al., —F.Supp. —(D. Minn. 1975).

[58] *Id.* Three federal judges in the New York case, seven federal judges in the Utah cases, two federal judges in the Pennsylvania cases and three federal judges in the South Dakota case. The sole dissent is contained in *Doe*, et al. v. *Wohlgemuth*, et al., *supra*, 376 F.Supp. at pp. 192-195.

to December 31, 1974, seven additional Federal judges have so held (without a single dissent being recorded) as to identical statutes in three additional states.[59]

3. *The Recognized Exceptions.*

The recognized instances in which appellate courts have similarly and consistently exercised the discretion to rule upon issues not squarely decided below include, among others: "where public policy requires";[60] "where a question of law is raised;"[61] "where, . . . a refusal to consider it would result in a miscarriage of justice";[62] where "the question sought to be raised is . . . so substantial . . . (or) material",[63] "wherein there are significant questions of general impact",[64] where it is "deemed necessary to reach the correct result",[65] "when fundamental rights are involved",[66] or where "the issues . . . raised are of great significance

[59] *Id.* Three federal judges in the North Dakota case, one federal judge in the Minnesota case, one federal judge in the West Virginia case, two federal judges in a Pennsylvania case (one judge finding the issue not justiciable). The issue in the Pennsylvania case was only one of many in a broad and encompassing abortion regulation statute. *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D. Penn. 1975).

[60] *K-2 Ski Company* v. *Head Ski Co., Inc.*, et al., 506 F.2d 471, 475 (9th Cir. 1974).

[61] *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970).

[62] *Evans*, et al. v. *Triple R Welding & Oil Field Maintenance Corporation*, 472 F.2d 713, 716 (5th Cir. 1973).

[63] *Securities and Exchange Commission*, et al. v. *Milner*, etc., et al., 474 F.2d 162, 166 (1st Cir. 1973).

[64] *Krause*, etc. v. *Sacramento Inn*, et al., 479 F.2d 988, 989 (9th Cir. 1973).

[65] *Washington Gas Light Company* v. *Virginia Electric and Power Company*, 438 F.2d 248, 251 (4th Cir. 1971).

[66] *Wratchford*, et al., etc. v. *S. J. Groves & Sons Company*, et al., 405 F.2d 1061, 1063 (4th Cir. 1969).

in construing an act designed to protect thousands . . ."[67] Each and every one of these alternative elements are strongly present in this cause.

4. *The History of Abortion Litigation In Missouri.*

The presence of the aforementioned factors in this cause were compounded and complemented by the Appellate Court's familiarity with the history of federal district court decisions arising from abortion litigation in Missouri. This Honorable Court similarly has not been unaware of the same.

Such cases, challenging the constitutionality of state and municipal regulation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe* and *Doe*, *supra* at p. 10 are pertinent and revealing. (See, *e.g.*,: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of abstention* [Unreported, E.D.Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974]; *Doe*, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing* [Unreported, E.D. Mo., No. 73C565(A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir. 1974], *dismissed on the merits* [Unreported, E.D.Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits*, 515 F.2d 541 [8th Cir. 1975]; *Wulff*, et al. v. *State Board of Registration for the Healing Arts*, et al. [medicaid exclusion of benefits for abortion], *dismissed for lack of standing*, 380 F.Supp. 1137 [E.D.Mo. 1974], *reversed on the merits* sub nom. *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 [8th Cir. 1974]; and *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al. [upholding the constitutionality of a recently enacted state stat-

[67] *Green v. Brown*, et al., 398 F.2d 1006, 1009 (2nd Cir. 1968).

ute], 392 F.Supp. 1362 [E.D.Mo. 1975], *stayed and enjoined*, 420 U.S. 918 (1975).[68]

In addition, of the scores of federal cases dealing with abortion related legislation, it appears that only three cases were ever required by the courts to be conducted as full scale trials. Two of those trials occurred in Missouri.[69]

The tragedy of this legislative pattern and judicial experience is the existence of its provisions during the time necessary to

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[68] It should be noted that petitioner's counsel, the Honorable John C. Danforth, Attorney General of Missouri, appears to be the only state official ever enjoined by a federal court as to the enforcement of a pre-1973 abortion statute, in a decision relying upon *Roe* and *Doe*, *supra* at p. 10. The District Court did not feel that following this Honorable Court's lead in assuming compliance by defendants would be sufficient. *Roe, id.*, 410 U.S. at p. 166 and *Doe, id.*, 410 U.S. at p. 201.

> "In this case the defendant Attorney General has not given 'full recognition' or 'credence' to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore
>
> ORDERED that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions . . ." *Rodgers*, et al. v. *Danforth*, etc., et al. (Unreported, W.D.Mo., No. 18360-2, 1973), *affirmed*, 414 U.S. 1035 (1973). (Apx. p. 57).

Similarly, the chief executive officer of the State's major metropolitan area, the Honorable John H. Poelker, Mayor of the City of St. Louis, in a related abortion case was found by the Eighth Circuit to have acted in a manner characterized as "arbitrary", "obstinately", "intransigent", "wanton," "callous", "oppressive" and "obdurate". *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 546-548 (8th Cir. 1975).

[69] Trials were required in the District Court proceedings of *Doe*, et al. v. *Poelker*, etc., et al., (Unreported, E.D.Mo., No. 73C565 [A], Jan. 13, 1975), *reversed*, 515 F.2d 541, (8th Cir. 1975) and in *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., 392 F.Supp. 1362 (E.D.Mo. 1975), *stayed and enjoined*, 420 U.S. 918 (1975). Trial was also conducted in *Planned Parenthood Association*, et al., *supra* at fn. 59.

obtain favorable appellate decisions. Every Missouri case to date has been often summarily and always adversely disposed of by the district court and preliminary injunctive relief denied. Every said case has been reversed or enjoined upon appeal.

C. **The inappropriateness for a statutory three-judge panel.**

1. *The Purpose and Intent of 28 United States Code, Section 2281.*

This Honorable Court has stated,

> "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge court procedure is not 'a measure of broad social policy to be construed with great liberality.' *Phillips* v. *United States*, 312 U.S. 246, at 251."
>
> . . .
>
> "The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90, 97-98 (1974).[70]

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[70] See, *MTM, Inc.*, et al. v. *Baxley*, etc., et al., 420 U.S. 799, 804 (1975).

The Appellate Court below, after resting its portal jurisdiction upon *Gonzalez, supra* (508 F.2d at 1213) (Apx. pp. 66-67), proceeded to follow faithfully the teachings of *Gonzalez, supra*. The singular purpose of Section 1253 has been preserved, albeit on the appellate level, by an effort to minimize the dockets of both this Honorable Court and the lower District Court, in a manner consistent with the full exercise of sound judicial administration. While petitioner argues for the strict literal construction, the Appellate Court determined,

> "(I)n the interest of judicial economy and logic we should now address the merits of this controversy." 508 F.2d at p. 1214. (Apx. p. 70).

In fact, injunctive relief, which lies at the crux of 28 U.S.C., Section 2281 and without which a mere declaratory judgment of state action as unconstitutional requires merely a single judge, was not granted by the appellate court.[71]

2. *The Lack of Necessity for a Three Judge Panel.*

This Honorable Court further noted in *Gonzalez, supra*, that,

> "(T)hree judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent . . ." 419 U.S. at p. 97 at fn. 14.

As to the question of obvious unconstitutionality, there are not only the identical equal protection state medicaid decisions cited *supra* at fns. 57 and 59, but a host of analogous equal protection public hospital cases, decided prior to December 31, 1974, upon which the Appellate Court below had to rely,[72] and in which not a single dissent appeared.

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[71] 508 F.2d at p. 1216. (Apx. p. 73).

[72] *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970) and *affirmed*, 434 F.2d 427 (D.C.C. 1970); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe v. Mundy*, et al., 378 F.Supp. 731 (E.D.Wis. 1974), *affirmed*, 514 F.2d 1179 (7th Cir. 1975); and *Santiago* v. *Colon*, et al. (Unreported, D.P.R., No. 74-362, Aug. 6, 1974). Subsequent to December 31, 1974, the identical principle has been reaffirmed in *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

Two other federal courts voiding identical medicaid provisions have held a three-judge panel to be unnecessary. One district judge voided the policy as a violation of equal protection[73] and the other as contravening federal law.[74]

D. **The issues were properly raised below.**

Petitioner does not contend that respondents' arguments on the merits were not properly raised below, although this has been the underlying reason for denying appellate review of issues not decided below in the cases cited by petitioner.

> "Although the rule is not absolute, a litigant cannot ordinarily expect to lose in the trial court on one theory and win on appeal under another."[75]
>
> "(A)n appellate court should not allow a party to attempt a whole new theory after he has been unsuccessful at trial."[76]

This rationale has no merit in the present cause, inasmuch as respondents have pursued the constitutional claims of the merits

[73] *Smith*, et al., *supra* at fn. 57.

[74] *Roe*, et al. v. *Norton*, et al., 380 F.Supp. 726, 728 (D.Conn. 1974), *reversed on other grounds*, —F.2d — (2nd Cir. 1975).

[75] *United States of America*, etc. v. *The Home Indemnity Company*, et al., 489 F.2d 1004, 1007 (7th Cir. 1973).

[76] *Empire Life Insurance*, etc., *supra* at fn. 50, 468 F.2d at p. 334.

from the very outset of the case and have raised no new issues at any stage of appeal.

In fact, the reverse is true. It is petitioner who unwarrantedly seeks a second time at bat, having struck out in the Appellate Court below. Respondents' brief in the Appellate Court below listed four distinct issues: "Point I—The Merits (A. The Unbroken Line of Authority Supporting Appellants' Position and B. The Appropriateness of Appellate Decision on the Merits); Point II—The Inappropriateness of Dismissal for Lack of Standing; Point III—The Inappropriateness of Denying Appellants Leave to Add Party Plaintiff(s); and Point IV—The Appropriateness of Appellate Jurisdiction Within This Honorable Court." Point I on the merits consumed approximately one-half of respondents total Argument in its appellate brief, which was served upon petitioner on or about August 28, 1974.

Petitioner within his appellate brief below knowingly elected not to contest nor to argue the merits; nor did petitioner rebut the merits during the course of oral argument below. Petitioner has not been without adequate opportunity to defend the legal merits. Instead, he willingly elected to remain silent. Petitioner was amply forewarned that respondents were petitioning the Appellate Court below for a ruling upon the merits and that the Appellate Court might well decide to reach the same. Petitioner, nevertheless, waived his opportunity to defend and voluntarily foreclosed himself of the opportunity then presented. Petitioner should not be permitted before this Honorable Court to plead that equity demands he be given the opportunity once again to contest the merits.

As one Appellate Court noted, it is,

> "'. . . not a right to afford a defeated litigant another day in court because he thinks that if he were given the opportunity to try his case again upon a different theory he might prevail.' "[77]

This is what petitioner attempts here, an opportunity to argue the merits which he chose not to contend previously, opting to rely entirely upon procedural defenses, although fully apprised that the merits were a prime issue of the appeal.

What is abundantly clear is that the principle and rules urged by the petitioner upon his Honorable Court apply when the party had changed theories in mid-stream of the appellate process and not, where as herein, the party has consistently fostered the same claims or theories throughout at all levels of the proceedings.

The second prevalent rationale for not deciding on appeal, issues not reached below, is the "needs of judicial economy" and the orderly administration of the judicial process.[78] It is clear that in the present cause, both goals were best served by the discretionary decision of the Appellate Court below to rule upon the merits of the issue squarely before them and then ripe for adjudication.

It can not accurately nor fairly be said that the Appellate Court below abused the inherent discretion which it had to rule upon the merits and accordingly, the exercise of such discretion should be affirmed by this Honorable Court.[79]

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[77] *Miller* v. *Avirom*, 384 F.2d 319, 323 (D.C.C. 1967).

[78] *Empire Life Insurance Company of America* v. *Valdak Corporation*, 468 F.2d 330, 334 (5th Cir. 1972).

[79] "Decisions reached in the proper exercise of . . . discretion have frequently been said not to be within the proper scope of appellate review, and it is clearly the ordinary practice of the appellate courts to refuse to review the exercise of such discretion except for abuse." 5 AM.JUR. 2d, Section 772, at p. 215. See, 4 C.J.S., Section 152, at p. 510.

CONCLUSION

Respondents have amply demonstrated the requisite and proper standing of respondent-physicians, as well as the authority and propriety of the Appellate Court's ruling upon the merits.

A soon to be published paper details the experience of Reproductive Health Services, a not-for-profit medical facility providing abortions in the metropolitan St. Louis, Missouri area. For the first eight months of 1975, January 1 through August 31, 846 indigent women, eligible for Missouri medicaid assistance received abortions at that facility alone, for which petitioner pursuant to the appellate decision below on December 31, 1974, made payment of $75.00 on behalf of each. Not a single payment was made during the years 1973 and 1974.

The unconscionable situation, where women of financial means can freely obtain their constitutionally protected medical rights and indigent women are arbitrarily and capriciously denied the use of public funds to procure the same medical right, cannot be condoned. To unwarrantedly exclude welfare payments for abortion is to effectively foreclose indigent women from the full exercise of their constitutional rights, particularly when said payments are made for childbirth. The state cannot be allowed to continue to favor the one choice over the other through an imposition of legislatively imposed ethical standards by financial blackmail.

To allow petitioner to retreat from the policy of payment would effectively abolish the right of abortion to these indigent women. It would create a travesty of health care to the poor and mock the full implication of this Honorable Court's prior decisions in *Roe* and *Doe*, *supra* at p. 10. It would further serve to prolong the ultimate and inevitably successful conclusions of the host of identical cases, now pending at various stages of the judicial process and cited *supra* at fns. 57 and 59.

WHEREFORE, respondent respectfully pray that the opinion of the Appellate Court below as to respondents' standing and the appellate review of the merits be affirmed forthwith.

Respectfully submitted

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Brief for the Respondents" upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner.

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